No. 83-687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFFORD B. ERNST, JR.

Petitioner,

versus

INDIANA BELL TELEPHONE COMPANY, INCORPORATED and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 5703,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, INDIANA BELL TELEPHONE COMPANY, INCORPORATED.

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Respondent, Indiana Bell Telephone Company, Incorporated, respectfully prays that this Court deny the Petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on July 28, 1983.

SUMMARY OF ARGUMENTS

I.

The Writ should be denied because Petitioner has failed to present any argument within the parameters of United States Supreme Court Rule 17, Considerations Governing Review On Certiorari, but rather merely argues the merits of his position.

II.

The Writ should be denied on the issue of the retroactivity of *DelCostello v. International Brotherhood of Teamsters* because, in the final analysis, that question is of only hypothetical significance in the instance case. Prior to the *DelCostello* decision, an Indiana plaintiff's Section 301 claim against his employer was governed by Indiana's 90-day statute of limitations for vacating arbitration awards. Petitioner's Section 301 claim, therefore, is barred by that 90-day statute of limitations, if not by *DelCostello*'s six-month statute of limitations.

III.

The Writ should also be denied on the issue of the retroactivity of *DelCostello* because there is no conflict among federal courts of appeals on this point. Additionally, there is no important federal question to be decided because *DelCostello* did not represent a "clean break" with past law; therefore, it was not fundamentally unfair to apply the six month statute of limitatons retroactively.

IV.

The Writ should likewise be denied on the issue of whether there is a private cause of action under 29 U.S.C. § 793(a) since every circuit court which has been presented with the opportunity of applying the *Cort v. Ash*, 442 U.S. 66 (1975), criteria to the language of that statute has found it inappropriate to imply a private remedy. Four of those decisions have been denied certiorari by this Court. Furthermore, there is no important federal question to be resolved.

V.

The issue of whether there was a genuine issue of material fact presented by Petitioner so as to preclude summary judgment is one which does not rise to the level of a question worthy of granting a Writ of Certiorari.

ARGUMENT

I.

The Writ Should be Denied Because Petitioner Only Argues The Merits Of The Issues He Raises And Does Not Set Forth What Considerations Warrant Granting His Petition.

Review on Writ of Certiorari is a matter of judicial discretion and is granted only when there are special and important reasons for so doing. United States Supreme Court Rule 17 references the types of reasons to be considered in granting review. Nowhere in his Petition does Petitioner address those reasons that make review appropriate; rather, he merely argues the merits of his position on the issues he raises.

II.

The Writ Should Be Denied On The Issue Of The Retroactivity of *DelCostello v. International Brotherhood Of Teamsters* Because It Is Academic In The Instance Case. Even If *DelCostello* Had Not Been Applied, Petitioner's Section 301 Claim Would Have Been Barred By The Much Shorter Limitations Period Found In Indiana Code § 34-4-2-13.

Petitioner contends that retroactive application of the six months' statute of limitations prescribed by this Court in *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (1983), would "work a severe hardship . . . and cause a substantial injustice upon" him. [Petition at 9] In support of this allegation, he claims that the controlling decision prior to *DelCostello* was *Auto Workers v. Hoosier*

Cardinal Corp., 383 U.S. 696 (1966), and that *Hoosier Cardinal* provided for a six year statute of limitations in suits brought by an employee against his employer and union pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) (1947), for breach of contract and breach of the duty of fair representation. This is inaccurate.

Contrary to Petitioner's claim, the controlling authority regarding the statute of limitations for hybrid Section 301/fair representation claims prior to *DelCostello* was this Court's decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981). In *Mitchell*, this Court addressed the issue of which of two state statutes of limitation was properly borrowed and applied to an employee's action against his employer under Section 301. Analogizing such a claim to an action to vacate an arbitration award, this Court held that the proper statute of limitations was the New York 90-day state statute for vacating an arbitration award. Any other characterization of the action, this Court commented, overlooked the fact that "an arbitration award stands between the employee and any relief which may be awarded against the company." *Id.* at 63 n.4.

Indeed, in his concurring opinion Justice Stewart distinguished the Court's earlier decision in *Hoosier Cardinal* as one which involved a garden variety breach of contract damage suit brought by the union against an employer under Section 301. As such, the suit in *Hoosier Cardinal* had not implicated "'those consensual processes that federal labor law is chiefly designed to promote—*the formation of the agreement and the private settlement of disputes under it.*'" *Id.* at 66, *quoting* 383 U.S. at 702 (Stewart, J., concurring) (emphasis by Justice Stewart). That situation, he concluded, was distinct from the one presented in *Mitchell* for two reasons. First, because *Mitchell* was a suit which sought to set aside a final and binding arbitration decision, it did not pose a direct challenge to "'the private settlement of disputes under [the collective bargaining agreement].'" 451 U.S. at 66. Moreover, because the plaintiff necessarily

had to prove that he was unfairly represented by the union before he could reach the merits of his Section 301 claim against the employer, the suit was best described as "an amalgam of Section 301, which has no limitations period, and the NLRA." *Id.* at 67.

After this Court's decision in *Mitchell*, therefore, it was beyond doubt that the controlling authority in hybrid Section 301/fair representation suits was *Mitchell*, not *Hoosier Cardinal*. Following *Mitchell*, the United States Court of Appeals for the Seventh Circuit held in *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981), *cert. denied*, 455 U.S. 947 (1982), that an employee's Section 301 claim against his employer and union brought in Indiana was governed by Indiana's 90-day statute of limitations for vacating arbitration awards. Indiana Code § 34-4-2-13 (1969).*

In the final analysis, therefore, the question of whether *DelCostello* is entitled to retroactive application is of only hypothetical significance in the instant case, since Petitioner's Section 301/fair representation claim is barred under the previous statute of limitations. Faced with this identical circumstance, the district court in *Marston v. LaClede Cab Co.*, Slip Opinion No. 83-1098(C)(1) (October 6, 1983, E.D. Mo.), made the following comment:

> "[T]his Court declines to pass on plaintiff's contention that *DelCostello* should not be applied retroactively, because the issue, fascinating as it may be, is only of hypothetical importance in this case. It is true that *DelCostello* changed the prior law, which was *Mitchell*, but application of *Mitchell* to this case would result in borrowing the [state] statute of limitations for vacating arbitration awards. Under that statute, the period of limitations applicable to plaintiff's federal claims . . . is ninety (90) days."

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*The district court in this case granted Indiana Bell's Motion for Summary Judgment, in part, because of the Indiana 90-day statute of limitations. 30 FEP Cases 1248 (S.D. Ind. 1981).

Id. at 3-4. (See Appendix at 4a-5a). *Accord Perez v. Dana Corporation*, 98 L.C. ¶10,484, 19,399 (3rd Cir., September 28, 1983) ("[I]n [*Mitchell*], the applicable state statute of limitations was only ninety days. [Plaintiff] obviously could not have relied on those cases in waiting twenty-three months to file this suit. Even if *DelCostello* constituted a clean break from the positions taken in [past] cases . . . it did not overrule past precedent on which [plaintiff] may have relied"); *James v. Communication Workers Local 3204*, 113 LRRM 3386 (N.D. Ga. 1983).

III.

The Writ Should Also Be Denied On The Issue Of The Retroactivity Of *DelCostello* Because There Is No Conflict Among Federal Courts Of Appeals Nor Is It Such An Important Question Of Federal Law As To Warrant A Decision By This Court.

Even if the issue of retroactivity is not considered to be academic in this case, the bases traditionally considered by this Court in granting review of a writ of certiorari are not present.

First, there is no conflict among federal courts of appeals as to whether *DelCostello* should be applied retroactively. Those appellate courts that have been confronted with Section 301 claims since *DelCostello* have applied it retroactively. The United States Court of Appeals for the Seventh Circuit did so in this case and subsequently in two others. *See Metz v. Tootsie Roll, Inc.*, 715 F.2d 299 (7th Cir. 1983); *Storck v. International Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1983). The only other federal circuit courts of appeals discussing *DelCostello*, the Third and Sixth Circuits, have applied it retroactively. *See Perez v. Dana Corp.*, 98 L.C. ¶10,484 (3rd Cir., September 28, 1983); *Curtis v. Teamsters Local 299*, 716 F.2d 360 (6th Cir. 1983). In *Perez*, the Third Circuit applied the test set forth by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining whether retroactive application was proper,

and expressly held that *DelCostello*, even though "decided subsequent to *Mitchell* and during the pendency of this appeal, applie[d] retroactively." 98 L.C. at 19,397. The Sixth Circuit, while dismissing the complaint because of a procedural error, did "note that the disposition in this case would have been consistent with the recent Supreme Court opinion in *DelCostello*. . . ." 716 F.2d at 361.

Furthermore, the issue of retroactivity is not such an important question of federal law as to require this Court's review. The standard for determining whether a judicial decision is entitled to retroactive application was codified by this Court in *Chevron Oil*, which established the following three-part test:

> "First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted] Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce a substantial inequitable result if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of non-retroactivity.'" [citation omitted].

Id. at 106-107. As noted earlier in Section II, prior to *DelCostello* this Court's decision in *Mitchell* was the controlling authority with respect to the statute of limitations applied in employee suits brought under Section 301. Even after *Mitchell*, however, the issue of the statute of limitations to apply was not finally resolved, since this Court did not consider whether the six month federal statute of limita-

tions found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1947), might apply to such hybrid actions. *See Perez v. Dana Corp., supra*, 98 L.C. at 19,401 n. 7 ("The circuits could not agree on whether the same statute of limitations governed both the action against the employer and the action against the union").

In light of the above, it can hardly be argued that this Court's decision in *DelCostello* represented a "clean break" with the past, or that it would be fundamentally unfair to apply the standard established in *DelCostello*. Indeed, *Mitchell* actually represented a more severe departure from previous Section 301 analysis, and yet *Mitchell* was given retroactive application by courts confronted with the issue of retroactivity. In *Lawson v. Local Union 100*, 698 F.2d 250 (6th Cir. 1983), for example, the Sixth Circuit rejected the claim that *Mitchell* should not be applied retroactively. The Sixth Circuit stated that:

> "As *Mitchell* makes clear, the law on the limitations question in Section 301 wrongful discharge and unfair representation cases has been in a state of confusion for some time. This Circuit and other circuits, prior to *Mitchell*, had adopted various state statutes of limitations, depending on the peculiarities of the limitations law of the state in question and the arguments of counsel in the particular case . . . [W]e do not believe that *Mitchell* represents the kind of 'clean break' with past precedent contemplated in *Chevron* and [*United States v. Johnson*, ____ U.S. ____ (1982)]. *Mitchell* was simply a 'clarification,' an attempt to impose a single policy and a single rule in a legally chaotic situation . . . We do not think that a 'clean break' occurs every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. To so hold would reverse the regular common law rule, applied in *Chevron* and *Johnson*, that we should not normally have one law for old cases and another law for new cases. We note also that both this Circuit and

> others have assumed that the *Mitchell* rule applies retroactively [citations omitted]."

Id. at 254. In fact, in her dissenting opinion in *DelCostello*, Justice O'Connor commented that, "It is quite appropriate to apply *Mitchell* retroactively. *Mitchell* did not represent a 'clear break' with past law. . . ." 51 U.S.L.W. at 4700 n. 2 (O'Connor, J., dissenting).

The guidelines for retroactivity, therefore, have already been established and that issue does not rise to the level of importance requiring this Court to address it.

IV.

The Writ Should Likewise Be Denied On The Issue Of Whether There Is A Private Cause of Action Under 29 U.S.C. § 793(a) Since There Is No Conflict Among Federal Courts of Appeals Nor Is That Issue Such An Important Question Of Federal Law Requiring This Court's Attention.

Whether it is appropriate to imply a private cause of action where none is expressly granted is a question controlled by the analysis set forth by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny. *See Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); and *Cannon v. University of Chicago*, 441 U.S. 675 (1979).

Each of the six circuit courts which have been presented with the opportunity of applying the *Cort* criteria to the language of Section 503 have found it inappropriate to imply a private remedy, and four of those decisions were denied certiorari by this Court.* *See Beam v. Sun Ship Building & Dry Dock Co.*, 679 F.2d 1077 (3rd Cir. 1982); *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S.Ct.

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*This point, more than any other, also speaks to the fact that this issue is not of the significance or magnitude to require review by this Court.

178 (1982); *Davis v. United Airlines*, 662 F.2d 120 (2nd Cir. 1981), *cert. denied*, 102 S.Ct. 2045 (1982); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979). No conflict exists among the circuits.

Furthermore, the issue of whether an implied private cause of action is appropriate under Section 503 is not such an important question of federal law that this Court need address it. The criteria for determining if an implied private cause of action exists are well settled.

In *Cort*, the following principles were established for determining whether it was proper to imply a private remedy where the statute itself provides no guidance:

> "First is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' [citation omitted]—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? [citation omitted] Third, is it consistent with underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [citations omitted] And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to confer a cause of action based solely on federal law? [citations omitted]."

422 U.S. at 78.

As this Court further explained in *Cannon v. University of Chicago, supra*:

> "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a

> court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent."

441 U.S. at 688. Cases decided by this Court subsequent to *Cort* and *Cannon* have emphasized that the "ultimate issue is whether Congress intended to create a private right of action [citations omitted]; but the four factors specified in *Cort* remain the 'criteria through which this intent [can] be discerned.'" *California v. Sierra Club*, *supra*, at 287, *citing Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 771-772 (1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, *supra*, at 23-24; *Touche Ross & Co. v. Redington*, *supra*, at 575-576; *Davis v. Passman*, 442 U.S. 228, 241 (1979).

The Seventh Circuit's opinion in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980), is a thorough analysis of the wording of Section 503 and its legislative history. In concluding that a private cause of action was inappropriate, the Seventh Circuit carefully evaluated each of the *Cort* criteria. It observed that Section 503 did not make discrimination against handicapped persons illegal, but only imposed an obligation on federal agencies administering federal contracts to incorporate an affirmative action clause. The Seventh Circuit went on to state that the language found in Section 503 fell squarely within this Court's observation in *Cannon* that:

> "There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices."

Id. at 1240, *quoting* 441 U.S. at 690-693. The Seventh Circuit thus concluded that while Section 503 did identify "a particular class to be benefited . . . the lack of [any] duty-creating language in Section 503 makes implication of a private judicial remedy difficult." 629 F.2d at 1240. *See Can-*

non, supra, at 690 n. 13 ("Not surprisingly, the right or duty creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action").

The Seventh Circuit next examined the legislative history surrounding Section 503. Respondent will not recite that lengthy discussion. It speaks for itself and has been carefully exhumed for review by other circuit courts as well. *See Fisher v. City of Tucson, supra; Davis v. United Airlines, supra; Rogers v. Frito Lay, Inc., supra.* Suffice it to say that the Seventh Circuit concluded that:

> "With the exception of the language from [one] Senate Report, we find all these excerpts from the legislative history ambiguous in their reference to Section 503.
>
> * * *
>
> "We are left without any indication that, contemporaneous with its adoption of Section 503, Congress intended to extend a private remedy to handicapped individuals allegedly harmed by their employer's failure to comply with his affirmative action obligation as a federal contractor. At most, we are faced with an assumption on the part of a legislative committee in 1978 that five years earlier Congress had created a private right of action to enforce Section 503. Such an assumption cannot be relied upon as a faithful indicator of prior Congressional intent."

629 F.2d at 1242-1243.

Finally, the Seventh Circuit determined that implying a cause of action would not meaningfully advance the purposes of the legislation. It stated that:

> "Section 503(b) provides an express administrative remedy for a handicapped individual who believes he has been injured by a contractor's failure to comply with Section 503(a) and the regulations implementing that Section. This fact insofar as it discloses the underlying purposes of the legislative scheme suggests that the implication of a private right in favor of [the plain-

tiff], would be inconsistent with the scheme."

629 F.2d at 1243.

The fact that every circuit court which has decided the issue, both before and after the Seventh Circuit's *Simpson* decision, has reached the identical result demonstrates that the decision is grounded on sound policy and analysis.

Petitioner's citation of the Seventh Circuit's decision in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), is not to the contrary. [Petition at 12] *Lloyd* made reference to 29 U.S.C. § 794 [Section 504], not Section 503, and is taken entirely out of context. In *Lloyd*, the Seventh Circuit found that a private cause of action was properly implied into Section 504 because its language closely tracked that of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which this Court has held provides a private cause of action. *See Lau v. Nichols*, 414 U.S. 563 (1974). In addition, the Seventh Circuit noted that as of the time the suit was commenced no administrative remedy was available to the plaintiffs under Section 504. The court stated that "[w]ithout the benefit of any regulations, it is difficult to perceive what relief could have been afforded at [the administrative] stage." 548 F.2d at 1287.

Lloyd, then, is entirely distinguishable from the *Simpson* holding. Not only is the language of Section 504 different from Section 503, but extensive regulations have been promulgated to give full effect to the prohibitions of Section 503. *See* 41 CFR § 60-741 *et seq.*

Accordingly, since the Seventh Circuit's opinion in *Simpson* properly applies well established criteria, and since there is not one circuit court decision in disagreement with *Simpson*, Petitioner's request for certiorari on this issue should be denied.

V.

Whether There Were Genuine Issues of Material Fact Presented By Petitioner So As To Preclude Summary Judgment Is Not An Issue That Properly Warrants Consideration By This Court.

The last issue Petitioner raises is whether the district court's grant of summary judgment against him was appropriate. Such a routine and common question does not rise to the level of the character of reasons for which this Court grants a writ of certiorari. Additionally, for the reasons set forth in Section II above, this issue is academic and need not be addressed.

CONCLUSION

Petitioner has failed to articulate any reasons or considerations of the character specified in Supreme Court Rule 17 that would suggest the Court should exercise its judicial discretion and grant review. Furthermore, when one scrutinizes the appropriate considerations it is abundantly clear that the Writ for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1098C(1)

DONALD MARSTON,

Plaintiff,

vs.

LACLEDE CAB COMPANY and
TEAMSTERS LOCAL UNION NO. 688,

Defendants.

ORDER

IT IS HEREBY ORDERED that defendants' motions for summary judgment on Court I of plaintiff's complaint, based upon the bar of the statute of limitations, be and are granted.

IT IS FURTHER ORDERED that Count I of plaintiff's complaint be and is dismissed with prejudice.

IT IS FURTHER ORDERED that Count II of plaintiff's complaint be and is remanded to the Circuit Court of the City of St. Louis, State of Missouri.

IT IS FURTHER ORDERED that defendant Laclede Cab's motion to strike be and is denied as moot.

/s/ John F. Nagle
UNITED STATES DISTRICT JUDGE

Dated: October 6, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1098C(1)

DONALD MARSTON,

Plaintiff

vs.

LACLEDE CAB COMPANY and
TEAMSTERS LOCAL UNION NO. 688,

Defendants.

MEMORANDUM

This case is now before this Court on the motions of defendants for judgment on the pleadings or, in the alternative, for summary judgment, with respect to Count I of plaintiff's complaint. Defendants argue that Count I is barred by the statute of limitations.

Plaintiff's cause of action arises out of his discharge from employment by defendant Laclede Cab Company (Laclede). The factual allegations are as follows. Plaintiff, who worked as a dispatcher for Laclede, was discharged on February 12, 1982. The alleged reasons for plaintiff's discharge were 1) plaintiff's "dishonesty", on February 10, 1982, in telling a Laclede Cab driver that plaintiff did not know the telephone number of the fire department when the driver requested it; and 2) plaintiff's lack of compassion in refusing to give the telephone number when a cab (belonging to a competitor of Laclede) was on fire. Plaintiff grieved his discharge and requested a service letter. The grievance was carried through step four (4) of the grievance procedure provided by the collective bargaining contract between defendants and covering plaintiff. Step four (4) is a two (2) man Adjustment Board consisting of one union and one company representative. On February 21, 1982, plaintiff was informed by his Shop Steward, a member of defendant

Teamsters Local Union No. 688 (Teamsters), that the Adjustment Board found in favor of Laclede. Sometime around the end of March, 1982,[1] plaintiff was informed by the Business Agent for Teamsters that plaintiff's grievance would not be taken to arbitration. Around the same time Laclede responded to plaintiff's request for a Service Letter with the statement that plaintiff was discharged on account of dishonesty in connection with the February 10, 1982, telephone number incident. Thereafter, on April 5, 1982, plaintiff requested a meeting of Teamsters' Executive Board to discuss his grievance and on May 27, 1982, the Executive Board denied his request.

On April 14, 1983, plaintiff filed the complaint in the Circuit Court for the City of St. Louis, State of Missouri. In Count I plaintiff alleges that Laclede's discharge of plaintiff was based on arbitrary and capricious grounds in violation of the collective bargaining agreement and that Teamsters violated its duty of fair representation of plaintiff in refusing to take his grievance to arbitration. In addition, Count I alleges a conspiracy between Laclede and Teamsters to discharge plaintiff on arbitrary grounds. All the acts in Count I are alleged to be violations of the Labor Management Relations Act of 1947 (LMRA). 29 U.S.C. §§ 141 *et seq.* Count II is based upon Missouri's Service Letter statute, R.S.Mo. § 290.140 (1982), and alleges that the reasons given by Laclede for plaintiff's discharge were false.

Defendants removed the case to this Court, under 28 U.S.C. § 1441, on the ground that this Court has original jurisdiction under section 301 of the LMRA, 29 U.S.C. § 185, over Count I of plaintiff's complaint and pendent jurisdiction over Count II. Defendants then moved for summary judgment in their favor on Count I on the ground that it is barred by the applicable statute of limitations.

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[1]In paragraph 9 of plaintiff's complaint the date is described as a few days after "March 25, *1983*." However, it is clear from other allegations in the complaint and the memoranda of the parties that March 25, *1982*, is what was intended.

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he can "show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." *Fed.R.Civ.P.* 56(e). *See also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In passing upon a Rule 56 motion for summary judgment, a court is required "to view the facts in the light most favorable to the party opposing the motion." *Vette Co. v. Aetna Casualty and Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980).

In *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (June 8, 1983), the Supreme Court considered the question of what period of limitations should govern in an employee's hybrid section 301/fair representation suit against an employer and a union. Earlier, in *United Parcel Service, Inc., v. Mitchell*, 451 U.S. 56 (1981), the Court held that a state statute of limitation for vacation of an arbitration award, rather than a state statute for an action on a contract, should govern in a section 301 suit against an employer. However, in *DelCostello* the Court effectively overruled *Mitchell* and held that the six (6)-month period of limitations provided in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should govern in hybrid section 301/fair representation suits both as to the claim against the employer and the claim against the union.

Defendants rely on *DelCostello* to support their contention that Count I of plaintiff's complaint is time-barred. It is the opinion of this Court that no genuine issue of material fact exists with respect to the statute of limitation question and, therefore, summary judgment is appropriate. The legal issues raised by defendants' motions and plaintiff's reply are as follows: 1) whether *DelCostello* should apply retroactively; and 2) when did plaintiff's causes of action under Count I accrue.

Plaintiff raises the retroactivity question because *DelCostello* was decided nearly two (2) months after plaintiff filed his complaint in state court. However, this Court

declines to pass on plaintiff's contention that *DelCostello* should not be applied retroactively, because the issue, fascinating as it may be, is only of hypothetical importance in this case. *cf. Storck v. Int'l. Brotherhood of Teamsters*, 712 F.2d 1194 (7th Cir. 1983). It is true that *DelCostello* changed prior law, which was *Mitchell*, but application of *Mitchell* to this case would result in borrowing the Missouri statute of limitations for vacating arbitration awards. Under that statute, R.S.Mo. § 435.405.2, the period of limitations applicable to plaintiff's federal claims in Count I is ninety (90) days.[2]

Plaintiff contends, relying on *Butler v. Local Union 823, Int'l. Brotherhood of Teamsters*, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975), that prior to *DelCostello* the Missouri five (5)-year statute of limitations for breach of contract actions would have applied to plaintiff's claims. This Court rejects plaintiff's argument because *Mitchell* in effect overruled *Butler's* choice of a state statute of limitations and borrowed a statute which typically provided a much shorter period. Arguably after *Mitchell* it was not clear which limitations period applied to a fair representation claim against a union. *See DelCostello*, 51 U.S.L.W. at 4694 n.1. However, *Butler* held that the period applicable to a section 301 claim also applies to a fair representation claim, 514 F.2d at 448, and *Mitchell* did not affect that portion of the Eighth Circuit's holding. Accordingly, in this circuit at least, after *Mitchell* and prior to *DelCostello* the period applicable to a hybrid section 301/unfair representation claim was the ninety (90)-day period in R.S.Mo. §

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[2]Prior to *DelCostello*, the period of limitations for vacating arbitration awards would have applied from the time plaintiff's claims accrued under federal law, even though plaintiff's grievance was never in fact taken to arbitration. *Hunt v. Missouri Pacific R.R.*, 561 F. Supp. 310, 314 (E.D. Ark. 1983); *Stahlman v. Kroger Co.*, 542 F. Supp. 1118, 1120 (E.D. Mo. 1982).

R.S.Mo. § 435.405.2 applies to all contracts entered into after August 13, 1980. *Stahlman*, 542 F. Supp. at 1120 n.1. The contract in this case was entered into on December 1, 1980.

435.405.2. Under *DelCostello* the period is six (6)-months or double that which plaintiff was entitled to prior to *DelCostello*. In light of this conclusion, it is unlikely that plaintiff wishes to contend that *DelCostello* should not be applied retroactively, and this Court does not reach that issue.

With respect to the issue of accrual, it is settled that a hybrid section 301/fair representation claim against both an employer and a union accrues on the date the employee's grievance is finally rejected and his opportunity to gain reinstatement through the contractual grievance procedure is aborted. *Butler*, 514 F.2d at 449; *Collins v. American Freight System, Inc.*, 559 F. Supp. 1032, 1036 (W.D. Mo. 1983); *Wilcoxen v. Kroger Food Stores*, 545 F. Supp. 1019, 1021 (E.D. Mo. 1982); *Stahlman v. Kroger Co.*, 542 F. Supp. 1118, 1120 (E.D. Mo. 1982); *Lincoln v. District 9 of the International Association of Machinists and Aerospace Workers*, 539 F. Supp. 1346, 1348 (E.D. Mo. 1982); *Fields v. Babcock & Wilcox*, 108 LRRM 3150, 3151 (W.D. Pa. 1981). The validity of this accrual rule was not affected by the Supreme Court's decisions in either *Mitchell* or *DelCostello*. In the case at bar, plaintiff's grievance was finally rejected around the end of March, 1982, when plaintiff was informed that his grievance would not be taken to arbitration. Plaintiff cites *Smith v. International Ladies Garment Workers Union*, 537 F. Supp. 347, 349 (M.D.Al. 1981), for the proposition that his claim did not accrue until defendants' last contact with the grievance filed by plaintiff, and argues that under this theory his claim did not accrue until May 27, 1982. Plaintiff concedes, however, that under either date his claim was not filed within six months thereafter and is thus time-barred if his claim accrued on either date.

As a last resort, plaintiff asserts that his claim should not be deemed to have accrued:

> until he had exhausted all of his administrative remedies as set forth in Section 10(B) (sic) . . . , or until the grievance was arbitrated or Plaintiff was given an explanation as to why the grievance would not be arbitrated.

"*Plaintiff's Trial Brief*" at 3-4. This Court rejects the latter two alternatives as illogical, frivolous and without merit. No arbitration has ever occurred and plaintiff has never been given an explanation as to why his grievance was not taken to arbitration. Plaintiff's argument is self-defeating in that it would logically lead to the conclusion that his claim has not accrued to this date. *See also, supra*, note 2. With respect to plaintiff's first alternative, plaintiff impliedly argues that in adopting the six (6)-month period of limitation in section 10(b) for hybrid section 301/fair representation claims, the Supreme Court in *DelCostello* also adopted the full panoply of section 10(b) N.L.R.B. procedures as conditions precedent to such suits. This Court cannot find support for plaintiff's argument in either the language or rationale of the Supreme Court's opinion in *DelCostello*.

Accordingly, this Court finds that plaintiff's claims in Count I accrued, at the latest, on or about May 27, 1982, and that such claims are barred by the applicable six (6)-month period of limitations. Defendants' motions for summary judgment be and are granted.

Plaintiff's remaining Count II is a state law claim over which this Court lacks original jurisdiction. Under 28 U.S.C. § 141(c) this Court has discretion to "remand all matters not otherwise within its original jurisdiction." Therefore, plaintiff's only remaining count, Count II, be and is remanded to the Circuit Court of the City of St. Louis, State of Missouri.

/s/ John F. Nagle
UNITED STATES DISTRICT JUDGE

Dated: October 6, 1983